

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

No. 37496-0-II

Respondent,

v.

JASON A. WILSON,

UNPUBLISHED OPINION

Appellant.

Hunt, J. — Jason A. Wilson appeals the trial court’s order denying his CrR 7.8 motion (1) to correct the offender score to which he had agreed when he pleaded guilty to two counts of second degree identity theft, and (2) to resentence him using the corrected offender score. He argues that the trial court erred when it refused to resentence him and concluded that his only options were to withdraw his guilty plea or to serve the sentence already imposed.

Although we agree with Wilson that his 2005 King County drug conviction was for a gross misdemeanor rather than a felony, we do not agree that his offender score was incorrect. Accordingly, we affirm Wilson’s sentence but remand for correction of his judgment and sentence to reflect his 2005 King County drug conviction’s proper classification.

FACTS

Following an investigation into a surge of financial fraud activity involving the use of “counterfeit, miniature, keychain style, credit cards,” the Ocean Shores Police Department arrested Jason A. Wilson on suspicion of fraud or identity theft. Thereafter, officers found evidence that Wilson had been using numerous individuals’ financial information to make counterfeit credit cards. The State charged Wilson with two counts of second degree identity

theft.

I. Guilty Plea and Stipulated Offender Score

In exchange for the State's agreement not to file additional charges based on evidence obtained in this case, Wilson pleaded guilty to the two identity theft charges. In his plea agreement with the State and in his statement on plea of guilty (plea documents), Wilson agreed that (1) the State's statement of his criminal history was correct and complete, (2) his prior offenses included a 2005 King County *felony* drug offense, (3) his offender score was eight points, and (4) the resulting standard sentencing range for the charges was 33 to 43 months confinement. A notation in the plea documents stated, "Pled Attempt," next to Wilson's 2005 drug offense, for which the document denoted one offender score point.

The Grays Harbor County Superior Court accepted Wilson's guilty plea and imposed 43-month sentences on each count, to run concurrently. Wilson did not challenge his offender score or sentencing range at the plea hearing or at sentencing. The court entered the judgment and sentence on December 10, 2007. Wilson did not file a notice of appeal or any other motion challenging the offender score or his December 10, 2007 judgment and sentence within 30 days.

II. CrR 7.8 Motion

The next month, however, on January 23, 2008, Wilson's counsel received a facsimile (fax) from another attorney, representing Wilson in another case, advising that the 2005 King County drug conviction listed in Wilson's criminal history was a gross misdemeanor, not a felony. The August 4, 2005 "non-felony" judgment and sentence for Wilson's 2005 King County drug conviction stated that he had pleaded guilty to "*Attempted* Violation of the Uniform Controlled

Substances Act: Possession of methamphetamine. *RCW 9A.28.020, 69.50.401(D).*”¹

Clerk’s Papers (CP) at 63 (emphasis added).

Based on this information, Wilson filed a CrR 7.8 motion asking the Grays Harbor County Superior Court to correct his offender score and to resentence him using a seven-point offender score instead of the previous eight-point score. At the motion hearing on March 17, 2008, Wilson argued that he was entitled to resentencing based on the correct offender score. The State argued that Wilson’s only options were to accept the agreed offender score and the resulting standard sentencing range or to withdraw his guilty plea and his plea bargain agreement with the State. The court denied Wilson’s motion for re-sentencing.

Wilson appeals.

ANALYSIS

Wilson argues that because his original judgment and sentence was based on an incorrect offender score derived from an error in his criminal history, the trial court erred when it concluded that he was not entitled to resentencing. Wilson is correct that his 2005 drug conviction was for a gross misdemeanor,² not a felony, as noted in the plea documents.

But he is not correct that he is entitled to resentencing.³ On the contrary, the record demonstrates that his eight-point offender score, on which his sentence was based, was correct.

¹ The reference to “RCW 69.50.401(D)” was apparently meant to be to RCW 69.50.401(2)(d).

² See *State v. Sherwood*, 71 Wn. App. 481, 488, 860 P.2d 407 (1993), *review denied*, 123 Wn.2d 1022 (1994).

³ We note that Wilson might have been entitled to resentencing if his offender score was incorrect based on a legal error. See *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). But such is not the case.

I. Classification of 2005 Drug Offense

The documentation Wilson produced in support of his CrR 7.8 motion for resentencing demonstrated that (1) in 2005, he had pleaded guilty to an *attempted* offense under RCW 9A.28.020, which classifies attempted class C felonies as gross misdemeanors⁴; and (2) the King County Superior Court had sentenced him for a gross misdemeanor, not a felony. CP 63. But Wilson’s criminal history, as related in his Grays Harbor County plea documents, stated that he had been convicted of a “felony”⁵ attempted drug offense in King County in 2005.

The original King County sentencing court’s characterization of this 2005 conviction required the Grays Harbor County Superior Court at Wilson’s 2007 sentencing for his later conviction to treat this prior King County offense as a gross misdemeanor. *State v. Sherwood*, 71 Wn. App. 481, 488, 860 P.2d 407 (1993), *review denied*, 123 Wn.2d 1022 (1994).⁶ The documentation Wilson produced in support of his CrR 7.8 motion for resentencing clearly demonstrated that in 2005 in King County he was convicted of a gross misdemeanor, rather than a felony.

⁴ RCW 9A.28.020(3)(d). In contrast, it is RCW 69.50.407 that classifies attempted offenses defined in chapter 69.50 RCW as felonies.

⁵ If Wilson had pleaded guilty to this drug offense under RCW 69.50.407, this felony characterization would likely have been correct. RCW 69.50.407 provides:

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

⁶ The *Sherwood* court held that when the original sentencing court characterizes an attempted possession of controlled substance crimes as a gross misdemeanor, collateral estoppel prevents the State from arguing in a subsequent sentencing proceeding that the earlier offense was actually a felony. 71 Wn. App. at 488.

II. No Sentencing Error

Despite this error in characterizing his 2005 King County conviction, Wilson fails to demonstrate that the Grays Harbor County Superior Court sentenced him using an incorrect offender score. RCW 9.94A.525(4)⁷ requires the trial court to “[s]core prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.” Wilson’s 2005 drug offense was an attempt to commit an offense under RCW 69.50.401(2)(d). Violations of RCW 69.50.401(2)(d) are class C felonies, which clearly count as one point in Wilson’s offender score. RCW 9.94A.525(7).

Because Wilson does not establish that the trial court sentenced him using an incorrect offender score, he is not entitled to resentencing, and we affirm his sentence. But because the judgment and sentence incorrectly states that the 2005 King County drug conviction was a felony offense, we remand for correction of this clerical error.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.

⁷ Neither party addresses this statute or its effect, if any, on Wilson’s offender score.